**UNITED STATES OF AMERICA**
**NATIONAL LABOR RELATIONS BOARD**

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| DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER, (Employer), | ) | |
| and, | ) | Case No. 08-RC-87639 |
| NATIONAL NURSES ORGANIZING COMMITTEE, (Union) | ) | **Evidence in Support of Objections to the Results of the Election** |
| SUSAN KELLEY and CINDA KEENER (Employee Movant-Intervenors). | ) | |

Pursuant to § 102.69(a) of the NLRB's Rules and Regulations, Susan Kelley and Cinda Keener ("Employee Intervenors") submit the following position paper and attached evidence in support of their two objections to the results of the election conducted on 29 August 2012. Each objection will be addressed in turn.

Each objection warrants overturning the results of the election given the small margin by which the Union prevailed in the unofficial election results. To the Employee Intervenors knowledge, the unofficial tally indicates that 100 employees voted for the union, 96 against it, and up to 7 ballots are under challenge. The objectionable conduct discussed below could certainly have changed the result of this close election. Moreover, "closer scrutiny by the Board of election objections" is required "where an election is close." *Medical Center of Beaver County v. NLRB*, 716 F.2d 995, 1000 (2d Cir. 1983).

## I. Objection 1: The Employer and Union Refused to Disclose Their Secret Agreement(s) to Employees upon Their Request

### A. The Facts

In late July 2012, DHSC, LLC, d/b/a Affinity Medical Center ("Affinity" or "Employer") and the National Nurses Organizing Committee ("NNOC" or "Union") jointly announced to employees that they were parties to an "election procedure agreement" or "neutrality agreement." Keener Decl., ¶ 2. Thereafter, the Union conducted an organizing campaign within the workplace. *Id*. Employees asked both their Employer and Union for a copy of the agreement(s) between them. *Id*. at ¶¶ 4-5; Kelley Decl., ¶ 4. They were never given copy of the agreement(s). *Id*.

### B. The Employer and Union's Refusal to Disclose Their Secret Pact Interfered with Employee Free Choice in the Election

The Employer and Union's refusal to disclose their secret agreement to employees upon their request interfered with the election because it rendered it impossible for employees to make an informed choice as to whether they wanted NNOC representation. Among other things, the agreement could contain pre-negotiated terms of employment that would strongly affect employees' votes.

It is likely that Affinity's agreement(s) with NNOC includes terms that govern how the Union can represent employees upon becoming their bargaining agent. Many organizing agreements contain, either in their body or in a side letter: (1) pre-negotiated bargaining concessions that relate to employees' wages, health benefits, and other terms of employment; (2) union commitment to not strike in support of bargaining demands; and/or (3) binding arbitration procedures that

govern contract negotiation.[1] Indeed, the AFL-CIO's prior General Counsel has acknowledged "[n]egotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement." Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, Lab. L.J., Summer/Fall 1996, 12 Lab. Law 165, 176-77.

Moreover, logic dictates that Affinity would not enter into an organizing agreement with NNOC in exchange for nothing. A *quid pro quo* clearly took place. The nature of this *quid pro quo*, which could directly affect employees, is being concealed from them.

This concealment constitutes objectionable conduct because courts have long recognized the "grave dangers posed by a backroom deal that is secretly negotiated by union officials and management." *Merk v. Jewel Food Stores,* 945 F.2d 889, 899 (7th Cir. 1991). Such deals are "certainly in derogation of national labor policy." *Id*. at 896; *see also Aguinaga v. UFCW*, 993 F.2d 1463, 1471 (10th Cir. 1993) (secret

[1] *See, e.g., Adcock v. Freightliner,* 550 F.3d 369, 375 (4th Cir. 2008) (union agreed to freeze wages and increase benefits costs at the expense of employees it already represented, and secretly agreed to make wage, benefit, transfer rights, severance, overtime, and other concessions at the expense of employees it sought to represent, to obtain the employer's assistance with unionizing the latter employees); *Patterson v. Heartland Indus. Partners*, 428 F. Supp. 2d 714, 716 (N.D. Ohio 2006) (employer "receive[d] the union's assurance of no strikes and other guarantees related to wages in return for providing the defendant union with worker addresses and by making plant facilities available to the union") (moot on appeal); *Dana Corp. (Int'l Union, UAW)*, 356 NLRB No. 49, at 22-23 (2010) (union agreed to health benefit and other concessions in exchange for organizing assistance); *Plastech Eng'd Prod., Inc.* (*Int'l Union, UAW*), 2005 WL 4841723, at 1-2 (NLRB Div. of Advice Memo. 2005) (same); Charles I. Cohen et al., *Resisting its Own Obsolescence–How the National Labor Relations Board Is Questioning the Existing Law of Neutrality Agreements,* 20 Notre Dame J.L. Ethics & Pub. Pol'y 521, 533-35 (2006) (unions pre-negotiate concessions for organizing assistance).

deal between union and employer unlawful); *Lewis v. Tuscan Dairy Farms*, 25 F.3d 1138 (2d Cir. 1994) (same).

Thus, the Board has recognized that a union violates § 8(b)(1)(A) of the Act when it refuses to provide employees with information regarding contract terms that affect their employment. This includes failing to provide employees with copies of a collective-bargaining agreement and a health and welfare plan, *Law Enforcement & Security Officers Local 40B*, 260 NLRB 419 (1982), information regarding grievances filed under a contract, *Branch 529, National Ass'n of Letter Carriers,* 319 NLRB 879 (1995); information regarding union referral procedures required under a contract, *Carpenters Local 370 (Eastern Contractors Ass'n)*, 332 NLRB 174 (2000); and information about an employees' rights and obligations under an agency shop clause, *Teamsters Local 579 (Chambers & Owens)*, 350 NLRB 1166, (2007); *Production Workers Union, Local 707,* 322 NLRB 35 (1996). Here, if NNOC's agreement with Affinity contains terms that will affect employees' terms of employment, the Union has violated § 8(b)(1)(A) by refusing to disclose those terms to those employees upon their request.

The Board's recent decision in *Dana* Corp., 356 NLRB No. 49 (2010) is also instructive. There, the Board majority held that whether pre-negotiated terms of employment evidence premature employer recognition of a union will, in "each case . . . depend upon its own facts," including "the context in which [the agreement] was adopted or the conduct that accompanies it." *Id*. at 11. In upholding the agreement at issue, the Board majority relied on employee knowledge of the agreement's

terms, stating that "such an agreement tends to promote an informed choice by employees. They presumably will reject the union if they conclude (or suspect) that it has agreed to a bad deal or that it is otherwise compromised by the agreement from representing them effectively." *Id.* at 12. Here, Affinity and NNOC's refusal to disclose the terms of their secret pact renders it impossible for employees to know if NNOC "has agreed to a bad deal or . . . is otherwise compromised by the agreement from representing them effectively," which in turn precludes "an informed choice by employees." *Id.*[2]

Of course, the Employee Intervenors do not need to establish that Affinity and NNOC's concealment of their agreement amounts to an unfair labor practice, or that their concealed agreement is itself illegal. Conduct that "renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

Affinity and NNOC's concealment of their secret arrangement made it impossible for employees to make a free and informed choice regarding whether they desired NNOC representation, as employees were deprived of material information regarding pre-arranged contractual limitations on the union's

[2] The Board in *Dana* did also "*not* address two theories asserted by the Charging Parties, but not argued by the General Counsel: (1) that the [pre-recognition agreement] violates Sec. 8(a)(1) because it promises benefits to employees if they choose the UAW as their representative; and (2) that the UAW violated its duty of fair representation under Sec. 8(b)(1)(A) by agreeing to concessions on substantive terms and conditions of employment in exchange for organizing assistance from Dana." *Id.* at 4 n.6 (emphasis added). The terms of the agreement(s) between NNOC and Affinity may be unlawful on these grounds.

representatio. For example, if NNOC secretly agreed to negotiate a particular wage rate, health benefit, or retirement benefit, employee knowledge of this agreement could change how they voted in the election. Or, if NNOC's pre-negotiated concessions are inconsistent with its campaign promises—for example, if the Union promised nurses to bargain for a pension but secretly agreed with Affinity to not do so—knowledge of this would make nurses more apt to vote against the Union.

In short, employees who are kept in the dark about a union's secret arrangements with their employer cannot make a free and informed choice about whether they want that union to be their exclusive representative. Affinity and the NNOC's refusal to provide copies of their agreement(s) to employees, upon their request, interfered with employee free choice in the election.

## II. Objection 2: The Employer and Union Jointly Engaged in Unlawful Surveillance of Employees Opposed to Unionization

### A. The Facts

Affinity permitted non-employee Union organizers to operate in its workplace pursuant to its agreement with the Union. Keener Decl., ¶ 2. These organizers monitored the activities of employees campaigning against the Union, reported their activities to the Employer, and demanded that their Employer take action against the employees pursuant to their agreement. *Id*. at ¶ 7; Kelley Decl., ¶ 6. Members of management informed employees of this monitoring of their conduct and sometimes took action in response to the Union's reports. *Id*. Overall, Affinity and NNOC's action created a strong impression amongst employees campaigning

against the Union that their protected activities were under their joint surveillance. *See* Keener Decl., ¶ 17; Kelley Decl., ¶ 10.

More specifically, Cinda Keener and/or Susan Kelley were informed by members of management that Union organizers reported to their Employer that: (1) employees were campaigning against the Union in the hospital cafeteria for too long or near the doors and should be removed, Keener Decl., ¶ 11; (2) an employee opposed to the Union was rude to an organizer and should be reprimanded, *id*. at ¶ 12; (3) employees campaigning against the Union set up a table outside of a hospital entrance and demanded that Affinity prohibit this activity (which it did), *id*. at ¶ 14; Kelley Decl., ¶ 8; (4) employees placed campaign materials on windowsills in the cafeteria and demanded that Affinity prohibit this activity (which it did), Keener Decl., ¶ 15.

Affinity also permitted a Union organizer to operate out of a manager's office in the department where Cinda Keener, Susan Kelley, and other nurses actively opposed to the Union worked. *Id*. at ¶ 16. The Union organizer, Donna Kennedy, was observed taking pictures of the nurses' work schedules and shifts that were posted in and around this office. *Id*.

Finally, and most egregious of all, Affinity and NNOC compelled and attempted to compel an employee leader of the anti-union campaign—Cinda Keener—to report her own protected activities and those of her co-workers. On or around 9 August 2012, the Union demanded that the Employer provide it with a timeline of the activities of several nurses campaigning against the Union, based on

the false pretext that they were campaigning on work time. *Id.* at ¶ 8. At the direction of a supervisor, Employee Intervenor Cinda Keener participated in the creation of a timeline of her activities and those of several of her co-workers. *Id.* This timeline was submitted both to the Employer's attorney and to the Union. *Id.*; *see also* Kelly Decl., ¶ 7.

On or around 23 August 2012, the Union *again* demanded that the Employer provide it with a timeline of the activities of Mrs. Keener and other nurses who opposed the Union. Keener Decl., ¶ 10. Once again, a supervisor directed Mrs. Keener to create a timeline of her activities and those of several of her co-workers, and informed her that it would be shared with the Union. *Id.* This time, Mrs. Keener refused to participate in the creation of such a timeline. *Id.*

### B. Joint Employer and Union Surveillance of Employees, and the Impression Thereof, Interfered With Employee Free Choice

"Since the earliest days of the Act, surveillance of employees by an employer, whether with supervisors, rank-and-file employees, or outsiders, has consistently been held to violate Section 8(a)(1)." J. Higgins, *The Developing Labor Law*, 178-79 (ABA 5th ed.). "The law is equally clear that an employer violates Section 8(a)(1) if it creates the impression among employees that it is engaging in surveillance." *Id.* at 179. Union surveillance of employees similarly can violate § 8(b)(1)(A). *See, e.g., Randell Warehouse*, 347 NLRB 591, 594 (2006). For at least three reasons, Affinity and the NNOC's joint surveillance of employees' opposed to the Union interfered with employee free choice in the election.

First, NNOC and Affinity jointly and wrongfully engaged in *actual surveillance* of employees engaged in protected activity. As detailed above, the Employer permitted Union organizers to operate within the employees' workplace pursuant to an agreement. These individuals then followed and monitored employees who were campaigning against the Union and reported their activities to management. This tracking and reporting easily constitutes surveillance of employees engaged in protected activities. *See, e.g., Quickway Transp., Inc.,* 354 NLRB No. 80, n.5 & 20 (2009) (following employees, monitoring their activity, and reporting it back to management constitutes unlawful surveillance); *Fieldcrest Cannon, Inc*. 318 NLRB 470, 503-04 (1995) (same).

A recent case involving NNOC itself is instructive. In *Saint John's Medical Center (NNOC)*, JD(SF)-23-10, 2010 WL 3285396 (N.L.R.B. Div. of Judge 2010), an administrative law judge found merit to the General Counsel and NNOC's claim that a security guard following two pro-union nurses around a hospital created an unlawful impression of surveillance. The ALJ found that the nurses "were engaged in union activity and the guards' continued presence immediately outside the nurses' lounge would have led them to reasonably assume their protected activities were under surveillance." Here, NNOC engaged in conduct similar to the misconduct about which it complained in *Saint John's Medical Center*.

Affinity and NNOC's surveillance is particularly egregious because the Union demanded that management take action against the employees being monitored pursuant to their secret agreement. Surveillance is held to interfere with employee

choice is because it communicates an *implicit* threat of reprisal to employees and chills their protected activity. *See, e.g.,* Higgins, *supra*, 179-80. Thus, there mere possibility that a union could have an employer retaliate against employees upon becoming their representative is sufficient to render surveillance coercive.

> Once elected, a union has a voice in determining when employees will work, what they shall do, how much they will be paid, and how grievances will be handled. Just as some employers have used the means at their disposal for retaliation, some unions have used their influence and authority to retaliate against employees who displease them.

*Randell Warehouse,* 347 NLRB at 594.

Here, the threat of employer reprisal for engaging in the protected activities was *express*. NNOC possessed the "influence and authority to retaliate against employees who displease" it based on its pre-recognition agreement with Affinity. Pursuant to this agreement, the Union demanded that Affinity stop employees from engaging in protected activities that the Union monitored and reported to management. This includes demanding that employees to take down their table of campaign materials, Keener Decl., ¶ 14, remove their materials from the window sill, *id*. at ¶ 15, and document their whereabouts both to management and to the Union, *id*. at ¶¶ 8,9,11. The Employer generally enforced these Union's demands. Employees thereby had actual reason to fear that the Union's monitoring and reporting of their campaign activities to their Employer would lead to management taking action against them, because it actually did.

Second, and at the very least, the Employer and Union's conduct created an *impression of surveillance*. "The Board test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from an employer statement (or conduct) in question that her union activities had been placed under surveillance." *Promedia Health Sys.*, 343 NLRB 1351, 1363 (2004) (citing *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999)). "Said another way, the issue is whether the employer's behavior would reasonably suggest to the employee that there was close monitoring of the degree and extent of his organizational efforts and activities." *Id.*; *see also United Charter Serv.*, 306 NLRB 150 (1992).

Any employee subject to the conduct at issue here would reasonably believe that their protected activities were under close Employer-Union surveillance. The nurses campaigning against the Union were tracked by individuals who were operating in their workplace pursuant to an agreement with their Employer. These individuals tracked the nurses' activities; reported them to management, and demanded that management take action against the employees pursuant to an agreement. Susan Kelley, Cinda Keener, and their co-workers could only conclude that their protected campaign activities were being closely monitored.

Any assertion that only NNOC, and not Affinity, is responsible for creating this impression of surveillance would be wholly unfounded. Affinity managers acted in response to the Union's reports, to include twice directing Cinda Keener to create timelines of her activities and those of her co-workers. Affinity managers also

informed employees that their activities were being reported to them. These communications alone create an unlawful impression of employer surveillance. *See Promedia Health*, 343 NLRB at 1363 (impression of surveillance created when employer told employee that she heard that employee was soliciting for the union); *Sam's Club*, 342 NLRB No. 57 (2004) (impression of surveillance created when employer told employees that he knew they were circulating a petition); *State Foods Corp*., 340 NLRB No. 56 (2003) (impression of surveillance created when employer told employee that he was being watched); *United Charter Serv*., 306 NLRB at 151 (impression of surveillance created when employer told employees that he knew of their organizing activities).

Moreover, employees would also view Affinity as being responsible for the surveillance conducted by the NNOC organizers. "The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Albertsons, Inc*., 344 NLRB 1172 (2005) (quoting *In Pan-Oston Co*., 336 NLRB 305, 306 (2001)). Here, employees could only believe that NNOC organizers were acting pursuant to company policy because: (1) the Union is a party to an agreement with Affinity; (2) the organizers were operating in the hospital with Affinity's permission; (3) the organizers reported employees' activities to management; and (4) Affinity acted on the complaints lodged by Union organizers against employees pursuant to their agreement. Employees in this circumstance would reasonably (and correctly)

believe that the Union organizers were effectively acting as management's eyes and ears in the facility during the organizing campaign.

It is irrelevant whether or not Affinity affirmatively intended to monitor employees' protected activities. What matters is that the Employer's conduct, in conjunction with that of the Union, certainly created an impression of surveillance. And that alone is sufficient to warrant overturning the results of the election. *Cf. Albertsons*, 344 NLRB at 1185-86 (employer created unlawful impression of surveillance notwithstanding that it actually "did not keep the protected activities under surveillance or intend to chill employee protected activities").

Third, that the Employer and Union jointly compelled and attempted to compel Cinda Keener to create a timeline of her activities and those of co-workers opposed to unionization is egregious behavior that itself warrants setting aside the results of the election. Employees cannot be interrogated about their own protected activities or compelled to engage in surveillance of their co-workers protected activities. *See Super Thrift Markets, Inc*. 233 NLRB 409 (1977) (setting aside election because manager asked two employees about their and other employees' union sentiments); *National Garment Co*., 241 NLRB 703 (1979), *affirmed* 614 F.2d 623 (8th Cir. 1980) (employer engaged in unfair labor practice by having employee monitor and report events at union meeting and setting aside results of an election based, in part, on this conduct); *Saginaw Furniture Shops, Inc.*, 146 NLRB 587, 591 (1964), *affirmed* 343 F.2d 515 (7th Cir. 1965) (unfair labor practice for employer to request that employee learn and report back the union sympathies of employees).

Certainly, the Board would not hesitate to set aside the results of an election if an employer twice directed an employee who *supports a union* to create timelines of her activities and those of other pro-union employees at the behest of an anti-union consulting group. What Affinity and NNOC did to Cinda Keener is indistinguishable, and warrants overturning the results of the election.

## CONCLUSION

The Employer and Union jointly engaged in conduct that interfered with employee free choice in the election. It is requested that the Region conduct a hearing regarding these objections, overturn the results of election, and conduct a re-run election.

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